(3)

No. 89-979

IN THE

Supreme Court of the United States

October Term, 1989

BAUSCH & LOMB INCORPORATED,
Petitioner,

vs.

HEWLETT-PACKARD COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

When a federal district court judge who is otherwise qualified to hear a case does not disclose to the litigants a non-disqualifying fact, does his failure to disclose that fact in itself provide grounds for his disqualification?

PARTIES

The Respondent is Hewlett-Packard Company, a corporation which has no parent, subsidiary, or affiliate companies.

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STATEMENT OF THE CASE

The Petition now before the Court stems from one of three related cases between the same parties all of which were heard by the same district court judge. All three cases involved patents relating to computer graphics devices known as X-Y plotters. Following Hewlett-Packard's introduction of a new and extremely successful X-Y plotter, Bausch & Lomb, a competitor, learned of a patent ("the Yeiser patent") which appeared to Bausch & Lomb to relate to Hewlett-Packard's plotters, and purchased an interest in that patent with the intention of asserting it against Hewlett-Packard. Recognizing that the claims of the Yeiser patent were flawed for its purposes, Bausch & Lomb sought and obtained a reissue of the Yeiser patent having additional claims (P.A. 4-5).[1] At once, Bausch & Lomb charged Hewlett-Packard with infringement of the reissued Yeiser patent, and litigation ensued.

The first of the three civil actions ("the title case"), filed by Hewlett-Packard in state court in California, concerned Hewlett-Packard's competing claim to the ownership of the Yeiser patent; Bausch & Lomb was successful in having the title case removed to federal court where it was assigned to Judge Aguilar. The second action, also filed by Hewlett-Packard, was for a declaratory judgment of invalidity, unenforceability, and non-infringement of the reissued Yeiser patent in which, *inter alia*, Hewlett-Packard challenged the enforceability of that patent based upon Bausch & Lomb's conduct in obtaining reissue from the Patent Office. The second action was assigned from the outset to Judge Aguilar. It is the case from which the Petition has resulted. A later filed third case, charging Bausch & Lomb with infringement of Hewlett-Packard's LaBarre patent, was also assigned to Judge Aguilar, and was consolidated with the action on the enforceability of the Yeiser patent.

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[1] "P.A." denotes the petition appendix provided by Bausch & Lomb, containing the decision of the Federal Circuit below.

In the title case, Judge Aguilar granted summary judgment *to Bausch & Lomb*, determining that it was the sole owner of the Yeiser patent. Significantly, had Judge Aguilar decided the title case *for Hewlett-Packard*, the issues in the declaratory judgment action would have been mooted, and that case never would have been tried.[2]

After a bench trial on one of Hewlett-Packard's affirmative defenses in the declaratory judgment action, Judge Aguilar found that all claims of the Yeiser reissue patent were unenforceable by reason of Bausch & Lomb's inequitable conduct in the reissue proceedings.[3] That conduct included the submission of a declaration and two affidavits to the Patent Office which, the Federal Circuit ruled, included not only "blatant misstatements" but "pure fiction" (P.A. 11). The factual findings by Judge Aguilar were not challenged by Bausch & Lomb on appeal and are not disputed here.

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[2]It is revealing that Bausch & Lomb does not question Judge Aguilar's impartiality or seek his recusal in the title case in which Bausch & Lomb prevailed, but only in the declaratory judgment case which it lost. The explanation Bausch & Lomb offered below was that the title case was decided on summary judgment, so that Judge Aguilar was not called upon to evaluate witness credibility, and therefore, Bausch & Lomb's concerns regarding any appearance of impropriety did not arise in that case. That attempted distinction fails here, because it is illogical to suggest that the existence of a judicial duty of disclosure depends upon whether a case will ultimately be decided on summary judgment or after trial. No one can know whether a case will eventually go to trial, and a judge cannot have a duty which arises only in an unidentifiable set of cases.

[3]In the Petition, Bausch & Lomb describes the judgment which rendered all claims unenforceable as "draconian" (Petition at 4) and reports that the Federal Circuit "reversed" that portion of the judgment (Petition at 6). That representation is false. The Federal Circuit did *not* reverse; it vacated and remanded only for the District Court to make one "missing finding" (P.A. 14). Furthermore, the Federal Circuit confirmed that there was nothing draconian about the judgment, by explicitly invoking the rule of law that inequitable conduct with respect to reissue claims will nullify all the original patent claims as well (P.A. 15-16). Indeed, Bausch & Lomb has not sought review of any substantive holding in this Court. Thus, Bausch & Lomb's attempts to imply any irregularity or bias in the trial court's decision ring hollow and are wholly without basis.

After Judge Aguilar's decision was rendered, Stephen Fox, a Hewlett-Packard attorney, learned that Judge Aguilar's son was employed by Hewlett-Packard, and reported that information to trial counsel, who in turn informed Bausch & Lomb.[4] Bausch & Lomb immediately moved to disqualify Judge Aguilar under 28 U.S.C. § 455(a) and (b)(5)(iii), asserting that the circumstance of his son's employment would cause a reasonable observer to question his impartiality, and that such employment constituted an interest that could be substantially affected by the outcome of the proceeding (O.A. 1).[5] A single motion was presented in the consolidated actions on the Yeiser and LaBarre patents,[6] but no corresponding motion was made in the title case, despite the fact the judge's son had been continuously employed by Hewlett-Packard throughout the pendency of that action as well.

The facts of record showed that Judge Aguilar's son held a non-managerial position at a distantly located division

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[4]Contrary to Bausch & Lomb's statement (Petition at 5), Mr. Fox was never assigned to this case. Although Bausch & Lomb complains that Hewlett-Packard had not earlier disclosed its employment of Judge Aguilar's son, describing it as "a failing that Hewlett-Packard has since attributed" to lack of awareness, (Petition at 4) the record is unchallenged that the Hewlett-Packard personnel involved had no knowledge of the existence of the judge's son, and no duty to poll some 83,000 employees for any possible relationship with Judge Aguilar.

[5]"O.A." refers to the appendix to this Brief in Opposition, which contains the decision of the district court on the disqualification motion. Bausch & Lomb's Petition Appendix provides only the trial court's decision on the merits, which does not address disqualification issues.

[6]The LaBarre patent case had not yet gone to trial. In that action, Bausch & Lomb admitted infringement of the LaBarre patent, but argued that the patent was invalid, relying principally upon prior art which had already been considered and found inadequate to defeat patentability of the LaBarre invention by the Patent Office. Judge Aguilar eventually ruled for Hewlett-Packard, finding that Bausch & Lomb had not provided clear and convincing evidence to overcome the statutory presumption of validity which attaches when a patent application passes the scrutiny of examination by the Patent Office. No irregularity or bias is reflected in that decision.

which had no connection with the divisions that developed the products involved in the suit, and where his employment and financial interests would not be impacted by the outcome of the litigation (P.A. 28). Judge Aguilar denied the motion, finding no factual basis for disqualification under section 455(b)(5)(iii), and finding nothing in the circumstance of his son's employment which would raise reasonable doubts about his impartiality under section 455(a).

On appeal, Bausch & Lomb abandoned its factually unsupported arguments under section 455(b)(5)(iii), and urged that employment of the judge's son was virtually a *per se* basis for disqualification under section 455(a). The Federal Circuit, applying the principles explained in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988), affirmed the denial of the motion.

Bausch & Lomb has now also abandoned its argument that Hewlett-Packard's employment of the judge's son is a fact which requires disqualification. Instead, it urges in its Petition as the grounds for disqualification the non-disclosure of that fact, not the fact itself. Accordingly, there is now no dispute between the parties that Judge Aguilar would not have been disqualified from sitting by reason of his son's employment, had he just disclosed that employment to the litigants. The issue here then is whether Judge Aguilar was under a duty pursuant to section 455(a) to disclose that non-disqualifying fact, such that non-disclosure is in itself disqualifying.

REASONS FOR DENYING THE WRIT

A. SUMMARY OF ARGUMENT

The Petition proposes to impose a duty on judges which is entirely without basis in statute or case law. If it existed, that duty would lead to the absurd result of elevating non-disqualifying circumstances into a basis for demanding recusal, solely because a litigant was not fully informed of

those innocuous circumstances by the court. In refusing to recognize such a duty, the decision below is completely consistent with the holdings of other circuits and of this Court; no such duty has ever been found.

Such a duty would serve no broad public interest, but only the narrow private concerns of disappointed litigants seeking to escape adverse decisions. It would not promote public confidence in the judiciary, but would provide a mechanism for the sound decisions of qualified judges to be circumvented by litigants who do not prevail on the merits.

B. ARGUMENT

1. NON-DISQUALIFYING FACTS ARE NOT RENDERED DISQUALIFYING MERELY BECAUSE A LITIGANT IS UNAWARE OF THEM

The duty which Bausch & Lomb seeks to impose on judges is perhaps most remarkable for the illogical results which would flow from it. As proposed by the Petition, failure by a judge to disclose a fact "of relevance to his impartiality" would generate a separate and independent ground for his disqualification (Petition at i). Under that standard, a fact which is "relevant", even though not disqualifying, must then be disclosed, or a litigant who later learns of it can escape from adverse decisions of that judge by moving for recusal and vacatur.

Thus, non-disqualifying circumstances would be transformed somehow into disqualifying facts, depending upon the extent of a litigant's awareness of them, and 28 U.S.C. § 455(a) would be essentially re-written to provide that an appearance of impropriety exists whenever a judge leaves a relevant but non-disqualifying fact unmentioned. In effect, a judicial *voir dire* would be necessary to comply with section 455(a).

Before this Court, it is uncontroverted that no appearance of impropriety arises from Judge Aguilar's

son's employment. Nonetheless, Bausch & Lomb asserts that its prior ignorance of that non-disqualifying circumstance should permit it selectively to erase certain of Judge Aguilar's decisions. Certainly, Congress did not intend section 455 to be a tool for litigants to shop for favorable decisions, and circumvent those which are considered unfavorable.

2. THE DECISION BELOW PRESENTS NO CONFLICT WITH THE HOLDINGS OF THIS COURT OR WITH THOSE OF OTHER CIRCUITS

Despite Bausch & Lomb's efforts to identify a basis for review under Supreme Court Rule 17 (Petition at 7), the decision of the Federal Circuit is wholly consistent with the decisions of this Court, and with those of the Seventh Circuit: no court has held that section 455 imposes a duty to disclose a fact when that fact fails to give rise to an appearance of impropriety.[7]

Specifically, there was no such ruling by this Court in *Liljeberg*. Bausch & Lomb notes that, under the peculiar circumstances of *Liljeberg*, this Court approved vacatur as encouraging judges and litigants to disclose facts that bear on possible grounds for disqualification. However, Bausch & Lomb makes too large a leap in reading into that approval a holding that section 455 contains a Congressionally-imposed duty on judges to disclose such facts.

Similarly, the Federal Circuit's holding below is consistent with the Seventh Circuit's decision in *In re National Union Fire Insurance Co.*, 839 F.2d 1226 (7th Cir. 1988).

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[7]There certainly is no such holding in the two cases cited by Bausch & Lomb in its Petition at 11, *Goldberg v. Goldston*, Copyright L. Rep. ¶ 25,203 (S.D.N.Y. 1980); *Securities Investor Protection Corp. v. Bell & Beckwith*, 28 Bankr. 285 (Bankr. N.D. Ohio 1983). In each, the trial judge determined (in a decision that was not reviewed by any appellate tribunal) that the facts *did* constitute a basis for disqualification, and so recused himself. Neither, therefore, has any bearing on the question of a duty to disclose a fact that has been adjudged (and affirmed by the Federal Circuit) *not* to give rise to a basis for disqualification.

While Bausch & Lomb notes that the court in *National Union* "opined" as to what the best practice may be (Petition at 8), nowhere in its decision did the Seventh Circuit rule that any duty of disclosure is prescribed in section 455.

Bausch & Lomb also suggests that the decision below deviates from current law by relying upon Resolution L of the Judicial Conference of the United States, which it asserts is "of uncertain status today" because its adoption preceded the 1974 amendment to section 455 (Petition at 8 n.8). Bausch & Lomb would ignore, however, that the vitality of Resolution L was confirmed with its citation by the Seventh Circuit in 1988 in *National Union*, 839 F.2d at 1231. Moreover, Resolution L has continued to provide sage guidance to the federal judiciary even after the amendment to section 455:

> In all cases involving actual, potential, probable or possible conflicts of interests, a federal judge should reach his own determination as to whether he should recuse himself from a particular case, without calling upon counsel to express their views as to the desirability of his remaining in the case. The too frequent practice of advising counsel of a possible conflict, and asking counsel to indicate their approval of a judge's remaining in a particular case is fraught with potential coercive elements which make this practice undesirable.

Resolution L of the Judicial Conference of the United States, *Review of the Activities of Judicial Conference Committees* at IV-27 (Sept. 1982).

Bausch & Lomb denies the applicability of that guidance by distinguishing disclosure alone from disclosure coupled with a request for consent of the parties (Petition at 8). In truth, there is no practical difference between, on the one hand, a judge disclosing a fact regarding a possible conflict

and seeking the views of counsel and, on the other hand, a judge merely disclosing such a fact. While the former procedure contains an explicit request for the consent of counsel to proceed, the latter procedure contains an implicit request that can be just as coercive. Under both situations, the parties must decide whether they wish to risk alienating the judge with a request for recusal. The message to counsel in both cases thus is the same: speak now, or forever hold your peace.

Recusal is an issue that Congress has wisely left to the discretion of judges, and the disclosure of non-disqualifying facts can be treated no differently.[8] In this case, Judge Aguilar exercised his discretion, guided by Resolution L, and concluded that a reasonable observer with knowledge of all the facts would find no basis on which his impartiality might reasonably be questioned. The Federal Circuit applied the standards of *Liljeberg* and *National Union*, and found no abuse of discretion in that decision. Clearly, no conflict in the case law has been presented to justify granting certiorari.

3. THE PETITION REFLECTS ONLY THE LAST DITCH EFFORT OF A DISAPPOINTED LITIGANT, NOT A QUESTION OF BROAD PUBLIC SIGNIFICANCE

Of course, the ultimate objective of the present Petition is to enable Bausch & Lomb to renew the motion that it coupled with its recusal motion below: to vacate under

[8]Bausch & Lomb wrongly suggests that the 1974 amendment to section 455 undermines the entrusting of recusal issues to judicial discretion (Petition at 8 n.8). While Congress sought to replace section 455's previous subjective standard with an objective standard of judicial disqualification, Congress also provided that questions of disqualification should continue to be resolved in the discretion of each judge and reversed only for "an abuse of sound judicial discretion." H.R. Rep. No. 1453, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 6351, 6355.

Fed. R. Civ. P. 60(b)(6) those rulings of Judge Aguilar which are unfavorable to Bausch & Lomb. Bausch & Lomb has never sought vacatur of all of Judge Aguilar's rulings relating to the Yeiser patent, only those which are adverse. By failing to ask for vacatur of the favorable decision in the title case while hypocritically invoking concerns about public perceptions of the administration of justice, Bausch & Lomb reveals that its only motivation in filing the present Petition is to avoid the consequences of its own unenviable conduct in submitting "pure fiction" in affidavits to the Patent Office.

The Petition is thus an instrument of tactics, not of public interest, as reflected by Bausch & Lomb's earlier conduct in this litigation. Although Bausch & Lomb now complains that its prior ignorance of the employment of Judge Aguilar's son should negate adverse decisions, it proceeded to trial on the LaBarre patent before Judge Aguilar, while its Federal Circuit appeal of the disqualification motion was pending. Certainly, had Bausch & Lomb truly felt that vital public interests were at stake, it could have moved for a stay, or sought a writ of mandamus to overturn Judge Aguilar's decision, as did the parties seeking disqualification in *National Union*, 839 F.2d at 1227, and *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1309 (2d Cir. 1988), *cert. denied*, 104 L. Ed. 2d 1012, 109 S. Ct. 2458 (1989). Bausch & Lomb chose to proceed without further challenge to Judge Aguilar, perhaps in the belief that its saber-rattling would deter Judge Aguilar from ruling against it in the LaBarre case.

Bausch & Lomb's advocacy before this Court is also revealing. For example, it suggests that Judge Aguilar kept "secret the existence of a source of bias" in a procedure equivalent to having "been assigned to the Star Chamber" (Petition at 10). First, there is no source of bias in this case. Bausch & Lomb has never charged that Judge Aguilar exhibited any actual bias, as it has never requested disqualification under the provision of section 455 which allows a party to allege that a judge has

"a personal bias or prejudice concerning a party." 28 U.S.C. § 455(b)(1).[9] Second, the recusal issue was decided not by any "Star Chamber", but in open court by the trial judge after full briefing by both parties, and that decision was reviewed and affirmed by the Federal Circuit.

Since the arguments in the Petition are not supported by the record, Bausch & Lomb reaches beyond it, citing to this Court certain press reports as "testament to the serious nature of the threat to public perception of the judiciary" (Petition at 12). As the Federal Circuit noted below, "[w]ithout anything in the record to establish how those articles came to be written, however, they are not persuasive of B&L's premise" (P.A. 29). And as the Second Circuit recently observed, "[j]udicial inquiry may not...be defined by what appears in the press." *Drexel Burnham*, 861 F.2d at 1309.[10]

Last, and certainly least worthy, Bausch & Lomb strains to color the inquiry before this Court by smearing Judge Aguilar personally. With the pretense of demonstrating that this case has not been mooted—*mootness never having been in issue*—Bausch & Lomb opens its statement of the case with a reference to an indictment and criminal trial which have absolutely no connection to this case or the issues raised by it (Petition at 2 n.2). Bausch & Lomb would also sling mud at Judge Aguilar for having "chose[n] a lower road", and for having been "less than candid sitting in judgment of the candor of others", when it is beyond question that he carefully followed the guidance of Resolution L of the Judicial Conference (Petition at 12). Such attacks come with ill grace from a litigant who purports to vindicate the cause of public confidence in the judiciary.

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[9]Bausch & Lomb also could have requested disqualification under 28 U.S.C. § 144, which provides that another judge be assigned to consider the allegation of bias or prejudice.

[10]If this Court does decide to go outside of the record to consider any press reports, it should consider *If All Else Fails, Blame the Judge*, Wall St. J., July 15, 1988, at 17, col. 2.

Given that Bausch & Lomb challenges only those decisions of Judge Aguilar that it does not like, that Bausch & Lomb must reach outside the record and distort the truth in its Petition to this Court, and that no source of bias—actual or apparent—exists in this case, it becomes evident that Bausch & Lomb is concerned solely with its own private interests that are adversely affected by Judge Aguilar's decisions. Bausch & Lomb's disappointment with those decisions, without more, does not raise issues which merit the grant of a writ of certiorari.

CONCLUSION

For the reasons presented, the writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

NO. C84-20642 RPA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

HEWLETT-PACKARD COMPANY,
Plaintiff

v.

BAUSCH & LOMB, INC.,
Defendant.

ORDER DENYING MOTION
FOR DISQUALIFICATION

I. *INTRODUCTION.*

Defendant Bausch & Lomb ("B&L") has brought this motion seeking my disqualification pursuant to 28 U.S.C. § 455 on the grounds that the employment of my son, Robert Anthony Aguilar, by plaintiff Hewlett-Packard ("HP"): (1) would cause a reasonable person to question my impartiality, 28 U.S.C. § 455(a); and/or (2) was an interest that could be substantially affected by the outcome of the proceeding. 28 U.S.C. § 455(b)(5)(iii).

II. *FACTUAL BACKGROUND.*

I have or recently have had on my docket at least four cases involving HP, a company with its headquarters in this venue. I am aware that there are at least four cases involving HP because counsel for HP has provided carbon copies to me of disclosure letters it sent to opposing

counsel in four cases on my docket. I am also aware of the fact that my son, Robert Anthony Aguilar, has been employed by HP for over a decade. HP informs me in its papers that Robert has been employed by it for a period of fifteen years and I have no reason to doubt that figure.

HP first learned of the connection between my son and me in June 1988 at an HP conference in Lake Tahoe, California. Subsequent to a presentation in which the speaker mentioned one or more cases involving HP on my docket, an HP employee attending the conference reported from the audience to the speaker that my son works for HP in its Corvallis, Oregon facility. HP investigated this statement and learned that of the ten individual employed by HP with the surname "Aguilar," one of them is my son Robert Anthony Aguilar. HP employs 83,000 employees.

After conducting an investigation and satisfying itself that disqualification was not required, HP contacted opposing counsel by letter informing them of the connection between me, my son Robert Anthony Aguilar, and HP. Shortly after receiving the letter, and without making a serious attempt to learn the basic details of the situation, B&L filed this motion for disqualification.

III. *DISCUSSION.*

B&L sets forth two grounds for my disqualification, both stemming from 28 U.S.C. § 455. In the first instance, B&L seeks disqualification because pursuant to § 455(a), a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." As explained in B&L's papers, the background of the provision suggests that Congress intended to replace the former subjective standard with an objective standard whereby the judge is to consider whether a reasonable person, "knowing all the circumstances, would believe that the judge's impartiality could be questioned." 13A Wright, Miller and Cooper, *Federal Practice and Procedure* § 3549, at 612 (West 1984). Thus, although Congress intended that

the judge himself make the decision whether disqualification is proper without soliciting the views of the parties, the standard to be applied is that of the "reasonable person." In making this determination, the Supreme Court has stated that "it is critically important...to identify the facts that might reasonably cause an objective observer to question [the judge's] impartiality." *Liljeberg v. Health Services Acquisition Corp.*, ____ U.S. ____, 56 U.S.L.W. 4637, 4642 (June 17, 1988).

B&L points to five facts which it believes counsel disqualification. First, for the three and one half years of this lawsuit, Robert A. Aguilar was continuously employed by HP. Second, HP only recently disclosed this fact to B&L. Third, the significance of this litigation to HP is "enormous". Fourth, HP has thwarted B&L's attempts to ascertain details of Robert A. Aguilar's employment relationship with HP. Fifth, HP "surreptitiously filed this action in order to secure the advantages of litigating in its home forum, and in a court where it had a strong likelihood of drawing the father of one of its employees as the judge." *B&L Moving Brief* at 8:16-20.

Had B&L deposed my son,[1] Robert Anthony, they would have learned that he has been employed by HP for a period of time of nearly twice the length of that which I have enjoyed as a federal judge. The mere fact of continuous employment means nothing in itself. My son and I have never discussed my HP cases or any other cases for that matter, except for occasional banter about results or facts of my cases that are in the news and generate public interest. We have never discussed the content or status of a pending case. In short, there is nothing in the fact that my son is employed by HP that would raise reasonable doubts about my impartiality.

[1]If B&L sincerely wanted to know all of the details about my son's employment at HP, it should have noticed his deposition. If HP had objected, I would have granted B&L's request to depose him for the purpose of gathering facts relevant to this motion. As discussed below, B&L's inability to obtain facts in this instance is partly a byproduct of their own lack of initiative.

Skipping to B&L's third point, this case is of some significance to HP. There are important intellectual property interests at stake. However, these interests do not affect my son. The HP division for which he works in Corvallis, Oregon does not produce HP plotters, nor is there any reason to believe that the security of my son's future employment would be negatively impacted by a decision adverse to HP. I understand that my son is a supervisor and has a significant job, but he is not part of management, nor does he have any role in policy making. It is simply not plausible to conclude that my decision in a case involving the San Diego division of HP making a product totally unrelated to the product made in Corvallis, Oregon would in any way be influenced or compromised by the fact that my son is a shipping supervisor in an HP plant in another state making a different product. Considering the size of HP and the magnitude of its sales, an adverse decision in one of its product lines is not likely to have such a significant impact that a reasonable person would doubt my impartiality merely because one of HP's 83,000 employees is my son.

Finally, with respect to B&L's complaints about HP's handling of this matter, these are merely complaints and not bases relating to the propriety of disqualification. While HP could have been more forthcoming, B&L apparently was satisfied to sit back and accept whatever it was given. As noted earlier, B&L has not sought to depose Robert Anthony Aguilar, nor have they attempted to discover basic information about my son's relationship with HP. And for B&L to contend that HP "surreptitiously filed this action" with a hidden agenda is almost irresponsible. A case that I decided in favor of B&L was originally filed by HP in California Superior Court and was removed to this Court *by B&L*. B&L eventually won that case by summary judgment in April 1986. B&L does not demonstrate good judgment in making such a base accusation about HP when B&L has brought a case to this Court and won it against vigorous opposition by HP.

The Question of Interest:

The second ground asserted by B&L supporting disqualification is contained in 28 U.S.C. § 455(b)(5)(iii):

> (b) He shall also disqualify himself in the following circumstances:
>
> (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
>
> (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding....

B&L's arguments in this regard are loose, unsubstantiated speculations, the product of B&L's admitted ignorance about the true facts regarding Robert A. Aguilar's relationship with HP. B&L speculates that Robert may own a stock in HP or be part of a profit sharing plan that would be adversely affected by my ruling in this case and others involving HP. In advancing these conjectures, B&L attaches great significance to its view that my decision with regard to HP's defense of inequitable conduct was a matter of first impression. B&L's position is that I was in a particularly conflicted position in deciding close questions of credibility based on a theory of inequitable conduct never before adopted in a reported decision. Under such circumstances, B&L insists that disqualification is appropriate under subsection (b)(5)(iii) of the disqualification statute.

My son Robert Anthony does not own HP stock and to my knowledge, and to the extent that the contrary has not been shown on the record, never has owned stock during the time of these proceedings. I learned for the first time in connection with this motion that my son is part of HP's profit sharing plan. The declaration of William H. MacAllister, Assistant General Counsel for HP, states that all HP employees are automatically enrolled in a cash profit

sharing program following six continuous months of employment. Payments are made twice annually in cash and no company stock is issued. Hence, this profit sharing plan is not a proprietary interest, but could be considered a financial interest in the well being of the company beyond simply the retention of one's job. HP reports, however, that "any large non-recurring charges which are considered outside the spirit of the program" are not deducted from the profit sharing fund. HP represents that even a large adverse judgment in this case would not have impacted any HP employee's profit sharing interest.

Considering all these factors as I must, I cannot find that my son has any proprietary or investment interest in HP that would compromise my ability to render a fair decision in this case. Given the above facts, a reasonable person would not have grounds to suspect that Robert Anthony's position and interest in HP was such that it might undermine my impartiality. Therefore, I cannot find a basis for disqualification on this ground.

IV. *CONCLUSION.*

For the reasons stated above, B&L's motion for disqualification is denied.

IT IS SO ORDERED.
DATED: August 1, 1988.

ROBERT P. AGUILAR
United States District Judge

CERTIFICATE OF SERVICE

This BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI has been served upon Petitioner by mailing three copies thereof to James W. Colbert, III, Esq., O'Melveny & Myers, 400 South Hope Street, Los Angeles, California 90071, Laurence H. Pretty, Esq., Pretty, Schroeder, Brueggemann & Clark, 444 South Flower Street—Suite 2000, Los Angeles, California 90017, and Bernard D. Bogdon, Esq., Bausch & Lomb Incorporated, One Lincoln First Square, Post Office Box 54, Rochester, New York 14601, this 18th day of January, 1990; all parties required to be served have been served.

Jonathan A. Marshall